BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF BERRY PETROLEUM COMPANY, LLC, A WHOLLY OWNED SUBSIDIARY OF LINN ENERGY, LLC, AS SUCCESSOR IN INTEREST TO BERRY PETROLEUM COMPANY, FOR AN ORDER FORCE-POOLING THE INTERESTS OF ALL OWNERS REFUSING OR FAILING TO BEAR THEIR PROPORTIONATE SHARE OF THE COSTS OF DRILLING AND OPERATING THE WELLS LOCATED IN THE DRILLING AND SPACING UNITS IN THE E½ of SECTION 5 AND ALL OF SECTION 7 IN TOWNSHIP 6 SOUTH, RANGE 4 WEST, USM, DUCHESNE COUNTY, UTAH.	**RESPONSE TO DIVISION'S RESPONSE TO PETITIONER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Docket No. 2014-012** **Cause No. 272-04**

INTRODUCTION

The hearing in this matter was held on May 28, 2014. At the conclusion of the hearing, the Utah Board of Oil, Gas and Mining (the "Board") took this matter under advisement and requested that Berry Petroleum Company, LLC, a wholly owned subsidiary of LINN Energy, LLC, as successor in interest to Berry Petroleum Company ("Petitioner") submit a proposed order. The Board also requested that the Utah Division of Oil, Gas and Mining (the "Division") give its "input" on the proposed order. On June 6, 2014, Petitioner emailed its proposed order to counsel for the Division and the Board. On June 18, 2014, the Division filed a Response to Petitioner's Proposed Findings of Fact, Conclusions of Law, and Order (the "Response") setting forth its objections.

Believing that the substance of the Division's response was not the input requested by the Board at the May 28, 2014 hearing and that a post-hearing legal memorandum is not permitted under the Board's procedural rules without leave of the Board, Petitioner filed a Motion to Strike. The Division has now filed its Reply to Petitioner's Motion to Strike.

In the absence of a decision in this matter and without further guidance from the Board regarding the permissibility and scope of post-hearing briefing, Petitioner is filing this Response to Division's Response to Petitioner's Proposed Findings of Fact, Conclusions of Law, and Order to respond to the Division's objections contained in the Response.

ARGUMENT

I. Due Process Has Been Satisfied in This Matter.

In its Response, the Division claims that due process has not been satisfied. To justify this conclusion, the Division creates an unworkable standard that required Petitioner to contact or send notice to every person identified as *possibly* having any connection to any entity that might be related to Burton/Hawks Inc. ("Burton"), without regard for whether that contact or notice was reasonably calculated to locate or notify the successor to Burton. The Division's rigid approach to due process is inconsistent with the standard established by the Utah Supreme Court.

A. Due Process is a Flexible, Situation-Specific Test.

The Utah Supreme Court has given clear guidance on due process. In a recent decision, the Court explained that "due process is a flexible test and requires notice reasonabl[e] under all the circumstances of a particular case." *Salt Lake City Corp. v. Restoration Network*, 299 P.3d 990, 1015 (Utah 2012) (internal quotation marks omitted). It is not, the Court said, "a fixed concept to be applied formulaically across different factual circumstances." *Id.* Due process

requires "notice *reasonably calculated*, under *all the circumstances*, to apprise interested parties of the pendency of an action." *Id* (emphasis added) (internal quotation marks omitted). To satisfy this standard, a party must consider "all the circumstances" of a particular case. *Id.* Individual pieces of information cannot be viewed in a vacuum.

It is important to point out that the various due process cases cited by the Division contained facts unique from those present in this case. For example, *Jackson Construction v. Marrs* (the primary case cited by the Division at the hearing) involved the due process rights of two individuals and whether notice by publication was proper. *See* 100 P.3d 1211 (Utah 2004). When requested to apply the holding from *Jackson Construction* in another due process case involving individuals, the Utah Supreme Court declined, explaining that the case "involved substantially different factual circumstances" and this case was "relevant to the limited extent that we recognize that due process is a flexible test and requires "notice 'reasonabl[e] under all circumstances' of a particular case." *Salt Lake City Corp. v. Restoration Network*, 299 P.3d at 1015 (Utah 2012).

In another case relied upon by the Division, *Weber County v. Ogden Trece*, the due process rights of a criminal gang were involved. *See* 321 P.3d 1067 (Utah 2013). In this situation, however, the criminal gang was still in existence and had more than 485 members that "live[d] in the community...." Id at 1078. The gang had not dissolved. The gang had not merged into another gang. Any comparison of an ongoing criminal gang to an expired corporation, which was at one time registered under the laws of the State of Utah, strains credibility. This case is, however, relevant to the limited extent that it points out that due process requires "reasonable diligence" in locating and notifying a party. The Court found that

the county had not exercised reasonable diligence because it had not "describe[d] any steps that it took to identify [the gang's] management structure..." *Id.*[1]

Based on the Utah Supreme Court precedent, to determine whether due process has been satisfied, the Board must evaluate whether Petitioner's actions were reasonably calculated (i.e., that Petitioner exercised reasonable diligence) under all the circumstances present in this matter to locate and notify Burton or its successor in interest.

B. Petitioner Exercised Reasonable Diligence in Attempting to Locate Burton or Its Successor in Interest.

Here, as testified to at the hearing, Petitioner spent countless hours and thousands of dollars attempting to locate Burton or its successor in interest.[2] (Hearing Transcript at 37-51.) Petitioner reviewed the various corporate databases for the various secretaries of state in an attempt to track down Burton or its successor. (*Id* at 37-43; Second Affidavit of Terry L. Laudick ¶ 6-14.) As detailed in affidavits filed before the hearing and in testimony given at the hearing, these corporate records were, at best, contradictory and, at worst, showed evidence of fraud. (Hearing Transcript at 37-43; Second Affidavit of Terry L. Laudick ¶¶ 6-14). Nevertheless, Petitioner did not stop there. Petitioner hired counsel to review the pleadings from a closed bankruptcy proceeding for EMEX Corporation, a company that succeeded to some but not all of Burton's interest, going so far as have its counsel call the former trustee and attorney

[1] As pointed out by the Division, the Court in *Weber County* said that "To meet the reasonable diligence requirement, a plaintiff must take advantage of readily available sources of relevant information and cannot turn[] a blind eye to the existence of other available sources." *Weber County*, 321 P.3d at 1079. This statement, however, referred to the county's failure to indicate whether its own "gang database" included information gang leadership. *Id* at 1078-9. It did not require the county to send notice to all 485 members of the gang.

[2] The Duchesne County and Bureau of Land Management records both list Burton as the current owner of record. Significantly, to be valid, an assignment of a federal oil and gas lease must be approved by the Bureau of Land Management. *See* 43 C.F.R. § 3106.1. Until such approval is given, the interest remains vested in Burton.

for this closed bankruptcy proceeding. (Hearing Transcript at 44-45.) This inordinately comprehensive search failed to disclose a successor to Burton's interest in this matter. The successor to Burton's interest was unlocatable.

Notwithstanding these facts, the Division argues that Petitioner should have contacted or sent notice to several individuals that were at one time affiliated with entities that might have been related to Burton, regardless of whether those entities are expired, have merged into other entities, or were dissolved in a bankruptcy proceeding. (Division Response at 3.) The Division also suggests that Petitioner should have sent an offer to participate to the former trustee of the closed bankruptcy proceeding for EMEX Corporation, a company for which there was no evidence that it had succeeded to Burton's interest. (Division Response at 2.) This statement shows a fundamental misunderstanding of bankruptcy law and court proceedings and completely ignores the testimony presented at the hearing. The bankruptcy proceeding had been closed and the identified assets distributed to the highest bidder. (Hearing Transcript at 44-45.) The former trustee had no responsibility for this bankruptcy estate. Sending an opportunity to participate to the former trustee—when he had no ongoing legal or proprietary interest and no power to participate—would have been useless.

In an unavoidable contradiction, the Division also argues that "the uncertainty regarding the succession to Burton's interest does not justify deeming a party unlocatable." (Division's Response at 3.) This statement begs the question: if the successor to Burton cannot be ascertained, how can it be located? The Division's answer to this question—that Petitioner should have spent "the relatively minimal amount of time and money it would have taken to

make a few phone calls"—is similarly flawed.[3] (*Id.*) Moreover, this statement turns a deaf ear and a blind eye to the evidence.[4] Petitioner did not deem Burton to be unlocatable at the beginning of its search. Rather, Burton was deemed to be unlocatable because of Petitioner's search. Petitioner spent far more time and money attempting to locate Burton or its successor than the "minimal amount" suggested by the Division. Petitioner followed every lead that it believed had any chance of locating a successor to Burton. As the testimony showed, it was in Petitioner's best interests to locate Burton or its successor in interest so that it could reach an agreement to purchase this interest, as it had with all of the other working interest owners. (Hearing Transcript at 40:4-6, 17-21.) The successor to Burton is not unlocatable because Petitioner did not make a few phone calls. The successor to Burton is unlocatable because it did not take any steps to update or protect its property interest.

The Division's due process standard is not a flexible test that takes into account all of circumstances in this matter. It does not consider whether actions would have been reasonably calculated to give notice to the successor to Burton. Instead, the Division applies a rigid test that requires notice to be given to everyone, without regard to the evidence. This nonsensical, carpet-

[3] The Division argues that due process was not satisfied because Petitioner did not contact or send an opportunity to participate to all of the names identified through Petitioner's research. (Division's Response at 3.) Again, the Division ignores the evidence. These people were related to entities that might have but were not proved to be associated with Burton. (*See* Second Affidavit of Terry L. Laudick.) There was no evidence indicating that any of the various entities with which these parties were associated ever owned an interest or, even assuming that they did, that they continued to own that interest. (*See id.*) Notice to these parties would not have been reasonably calculated to reach a successor to Burton.

[4] The Division implies that the lack of "documentary evidence" prevents the Board from determining "who was contacted" so that "the *Board could deem the party unlocatable.*" (Division's Response at 3 (emphasis added).) The Division also claims that "there is too much self-interest involved to take [Petitioner's] word for it." (*Id*). These statements places an unjustifiable emphasis on documentary evidence over testimony given under oath at the hearing. Even worse, the latter statement implies that Petitioner's witness may have lied under oath. Again, as stated throughout this memorandum, the Division ignores the evidence. Petitioner filed two separate affidavits with attachments documenting the results of its efforts to locate and notify a successor to Burton. (*See* Affidavit of Terry L. Laudick and Second Affidavit of Terry L. Laudick.)

bombing approach to due process cannot be reconciled with the flexible, situation-specific standard set forth by the Utah Supreme Court and should not be applied in this matter.

The evidence presented at the hearing shows that Petitioner exercised reasonable diligence under the circumstances in its efforts to locate and notify Burton or its successors in interest. Due process has been satisfied.

II. The Proposed Order Should be Effective as of the Date the Spacing Order is Effective For Each Well.

In its second objection, the Division correctly points out that the proposed order does not address its effective date. (Division's Response at 5.) Consistent with its amended request, Petitioner asks the Board to issue the order effective as of the date of the spacing order (i.e., for each drilling unit as of the date of first production for each of the wells located in the respective drilling units or, for the wells that have not yet began producing, the date the spacing order is issued). A revised proposed order that addresses the effective date if being submitted concurrently with this memorandum.

Petitioner notes that Division asserts that the "request to backdate a pooling order to a date *before the filing of the spacing request*, would violate the rule set out in [*Cowling v. Board of Oil, Gas and Mining*, 830 P.2d 220 (Utah 1991)]...." (Division's Response at 5.) Petitioner disagrees. The issue in *Cowling* was whether a pooling order can predate a spacing order. *See Cowling v. Board of Oil, Gas and Mining*, 830 P.2d 220 (Utah 1991). The court did not address whether a pooling order can predate the filing of the spacing request. *Id.*

Moreover, the retroactive pooling in *Cowling* would have resulted in a redistribution of the royalty proceeds, since the drainage area consisted of divided ownership for individual tracts.

Id at 222. Here, the distribution of production proceeds will be the same before and after the entry of a spacing order, since it involves undivided (uniform) ownership throughout. (*See* Exhibit K.) The retroactive spacing and pooling in the lands subject to this matter does not result in reallocation of production. (*Id.*) Indeed, the Division states that it "cannot imagine how any property owner could be injured [by] orders that ascertained pools and force sharing on the same basis and ratios as the common-law property law would require." (Division's Response at 5.) The same is true of pooling.

It is also important to note that spacing has been requested here only because it is a prerequisite to pooling. *See* Utah Code Ann. § 40-6-6.5(1). Spacing is not required to properly allocate production to the owners. The distribution of production will not be affected by spacing.

The Board should not use a required procedural step in the process of force-pooling as a basis for denying force pooling.

III. The Force-Pooling Penalty Should be Applied to All Costs of Drilling and Producing the Well.

Utah's compulsory pooling statute defines a nonconsenting owner as an owner "who does not consent *in advance* to the drilling and operation of a well or agree to bear his proportionate share of the costs." Utah Code Ann. § 40-6-2(11). By definition, the force-pooling statute evaluates whether an owner has consented or agreed to bear his proportionate share of costs prior to the drilling of a well. It stands to reason that this is the point in time at which the right to obtain a force-pooling penalty arises. And since the right to obtain the force-pooling penalty arises prior to drilling the well, the costs covered by this penalty should also date back to cover all the costs associated with drilling the well.

This reasoning is consistent with the language of the force-pooling statute, which states that the nonconsent penalty should apply to "that interest which would have been chargeable to the nonconsenting owner had the nonconsenting owner initially agreed to pay the nonconsenting owner's share of the costs of the well *from commencement of operation.*" Utah Code Ann. § 40-6-6.5(d)(ii). The statute does not address application of the penalty to the outstanding balance of costs incurred.

CONCLUSION

The Division's legal objections should be disregarded. Due process has been satisfied, retroactive pooling to the date of the spacing order is just and reasonable under the circumstances, and the nonconsent penalty should be applied to all costs of drilling and operating the well.

Petitioner respectfully requests that the Board approve the revised proposed order submitted concurrently with this memorandum.

DATED this 3rd day of July, 2014.

BERRY PETROLEUM COMPANY, LLC

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **RESPONSE TO DIVISION'S RESPONSE TO PETITIONER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** in the above captioned matter, to be sent, via email or U.S. Mail, this 3rd day of July 2014, to the following:

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Respectfully submitted this 3rd day of July, 2014.

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